

VERMONT ENVIRONMENTAL BOARD
10 V.S.A. Chapter 151

Re: Spring Brook Farm Foundation, Inc.
Land Use Permit Application #2S0985-EB

CHAIR'S RULING ON PRELIMINARY ISSUES

I. BACKGROUND

On August 8, 1994 the District #2 Environmental Commission ("District Commission") issued Land Use Permit #2S0985 ("Permit") to the Spring Brook Farm Foundation, Inc. ("Foundation") for a project described as the construction and operation of a 5,425 square foot student residence hall to house groups of up to twenty grade school students and two teachers for a week at a time between March and November ("Project"). The Project is located off Spear Cemetery Road in the Town of Reading and a portion of the Project is also located in the Town of West Windsor, Vermont.

On September 7, 1994 Helen S. Mayer filed an appeal from the Permit with the Board. Ms. Mayer contends. the District Commission erred by: issuing the Permit pursuant to Board Rule 51, Minor Application Procedures; denying her party status request under Board Rule 14(A)(3) with respect to Criteria 5 (traffic), 8 (aesthetics), 9(C) (forest and secondary agricultural soils), 9(K) (public: investment and facilities), and 10 (conformance with local and regional plan); denying her party status request under Board Rule 14(B)(1)(b) with respect to all ten Act 250 criteria; denying her request that the- Vermont Land Trust, Inc. (VLT) be made a co-applicant with the Foundation; issuing the Permit with respect to all ten Act 250 criteria including 5, 8, 9(C), 9(K), and 10; and failing to impose sufficient conditions to ensure that the Project complies with the Permit..

On October 31, 1994, Ms. Mayer filed her petition for party status (the Petition). Also on that day Board Chair Art Gibb convened a prehearing conference in Montpelier, Vermont with the following parties participating:

Spring Brook Farm Foundation, Inc. by Stephen R.
Crampton, Esq.
Helen S. Mayer by John D. Hansen, Esq.
Vermont Land Trust by Annette Barry

At the prehearing conference the Foundation and Ms. Mayer agreed that the Board should rule on certain preliminary matters regarding party status and Board Rule 51 but not proceed to a- hearing on the merits (if required) until after the Vermont Supreme Court issues its decision regarding the Foundation's appeal of Re: Spring Brook Farm Foundation,

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Inc., Declaratory Ruling #290 (May 20, 1994).

On November 4, 1994 Chair Gibb issued a Prehearing Conference Report and Order (the Prehearing Order).

On December 2, 1994, Ms. Mayer filed a memorandum of law in support of the Petition and the other preliminary issue identified in **the** Prehearing Order (the Mayer Memorandum).

On January 11, 1995, the Foundation filed a reply memorandum relative to the issues identified in the Prehearing Order (Foundation Memorandum).

On February 1, 1995, John T. Ewing became Chair of the Board.

If. PRELIMINARY RULINGS

Pursuant to Board Rule 16(B), the Chair may issue preliminary rulings. Any such ruling may be objected to by any party, in which case the ruling shall be reviewed and the matter resolved by the Board.

III. ISSUES.

As stated in the Prehearing Order, **the preliminary** issues to be decided are:

1. Whether Ms. Mayer should be granted party status pursuant **to** the same Board Rules and criteria which she sought before the District Commission.
- 2.. If Ms. Mayer **is** entitled to party status, whether the Permit was validly issued pursuant to the requirements, of Board Rule 51.

IV. DECISION

A. Party Status

Party status. determinations are governed by 10 V.S.A. § 6085(c)(1) and Board Rule 14. 10 V.S.A. § 6085(c)(1), as amended effective March 15, 1995,¹ states in pertinent part:

¹The substance of the amendments, does not affect the party status issues in this proceeding.

Parties, shall be those who have received notice, adjoining property owners who have requested a hearing, and such other persons as the board may allow by rule. ... An adjoining property owner may participate in hearings and present evidence only to **the** extent the proposed development or subdivision will have a direct effect on his or her property under section 6086(a)(1) through **(a)(10)** of this title.

In turn, Board Rule 14 states in pertinent part:

(A) Parties by right. In proceedings before the board and district commissions, the following persons shall be entitled to party status:

...
(3) Any adjoining property owner who requests a hearing, or who requests the right to be heard by entering an appearance on or **before the** first day of a hearing that has previously been scheduled, to the extent that the adjoining property owner demonstrates that the proposed development or subdivision may have a direct effect on his. property under any of the 10 criteria listed at section 6086(a) of this title. In making a request for party status, an adjoining property owner shall provide the district commissions or the board with the following:

(a) A description of the location of the adjoining property in relation to the proposed project, including a map, if available.

(b) A description of the potential effect of the proposed project upon the **adjoiner's** property with respect to each of the criteria or subcriteria under which party status is being requested.

(B) Parties by permission.

(1) The board or district commission may allow as parties to a proceeding individuals or **groups**, including adjoining property owners, not

otherwise accorded party status by statute upon petition if it finds that the petitioner has adequately demonstrated:

...

(b) That his participation will materially assist the board or commission by providing testimony, cross-examining witnesses, or offering argument or other evidence relevant to the provisions of section 6086(a).

A person denied party status may appeal the denial to the Board. Such a person is aggrieved by the denial and is deemed to be a party for the purpose of deciding party status. Party status decisions by district commissions may be challenged by appeal or cross-appeal. Re: St. Albans Group and Wal-Mart Stores, Inc., #6F0471-EB, Memorandum of Decision (April 15, 1994). The Board considers appeals from the denial of party status de novo. Re: Pico Peak Ski Resort, Inc., #1R0265-12-EB (March 2, 1995), Re: St. Albans Group and Wal-Mart Stores, Inc., supra.

1. Party status as an adjoining property owner

Ms. Mayer petitioned for party status as an adjoining property owner under criteria 5, 8, 9(X) and 10. She states in the Mayer Memorandum that "[s]he believes that her petition for party status is adequate to demonstrate entitlement to party status under each of these criteria." Mayer Memorandum at 10.

An adjoining property owner will be entitled to party status if that person demonstrates **that the** proposed development or subdivision may have a direct effect on his property under any of the 10 criteria of 10 V.S.A. § 6086(a). Here, Ms. Mayer has not demonstrated such a direct effect under any of the criteria raised by her. Accordingly, Ms. Mayer has not demonstrated that she is entitled to party status under Board Rule 14(A)(3).

a. Criterion 5

Criterion 5, 10 V.S.A. § 6086(a)(5), requires the board or district commission to find that a subdivision or development will not cause unreasonable congestion or unsafe conditions with respect to use of the highways, waterways, railways, airports and airways, and other means of transportation existing or proposed.

Fundamental to the consideration of Ms. Mayer's request for party status under Criterion 5 is the amount of traffic which the Project will generate. The Foundation Memorandum represents that the Project will generate no more than ten vehicle trips per day.² The Foundation's representation confirms the District Commission's finding that the Project will generate a maximum of ten vehicle trips per day. Ms. Mayer does not dispute the ten vehicle trips per day maximum in her Petition or the Mayer Memorandum. Ms. Mayer has not demonstrated how a maximum of ten vehicle trips per day may have, a direct effect on her property.

In the Petition, Ms. Mayer describes various impacts that the proposed development will have on traffic on Caper Hill Road and Spear Cemetery Road. She states that "in order to make reasonable use of her property, Helen S. Mayer will be exposed to the added risks which new and increased traffic generated by this development will create." Petition at 2. She also states that "[u]se of these roads for trucks, heavy construction equipment and school buses in connection with this development will clearly increase the risks to Helen S. Mayer, her family and guests." Id.

Ms. Mayer fails to specifically address how her exposure to a maximum of ten vehicle trips per day may have a direct effect on her property with regard to unreasonable congestion or unsafe conditions on Caper Hill Road. For example, she describes, the dangerous intersection of Caper Hill and Spear Cemetery Roads, Id., but does not demonstrate how the increased traffic will cause this intersection to be more unsafe than it is already. Accordingly. Ms. Mayer has not satisfied the Board Rule 14(A)(3) party status test with respect to Criterion 5.

b. Criterion 8

Criterion 8, 10 V.S.A. § 6086(a)(8), requires the board or district commission to find that a subdivision or development will not have an undue adverse effect on the

²Under Board Rule 2(P), a material change includes any alteration to a project which has a significant impact on any finding, conclusion, term or condition of the project's permit and which affects one or more values sought to be protected by the Act. If actual traffic volumes are not as represented by the Foundation, such variation may constitute a material change to the Project and require a permit amendment under Board Rule 34.

scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas.

In her Petition, Ms. Mayer describes her concerns about the aesthetic impacts which may result from the development. Petition at 3. She describes how the development will not "fit" the surrounding area and its residential and agricultural nature. Id. She states that safety-related improvements which she contends should be made would have **undue adverse** impacts on the surrounding area. Id. However, the District Commission has placed no conditions on the development requiring the improvement of Caper Hill and Spear Cemetery Roads. In fact, as she points out, neither the Applicant nor the Town of Reading propose to make any improvements to Caper Hill Road or Spear Cemetery Road. Petition at 2. As- a result, no adverse aesthetic impacts will occur to the roads as a result of the proposed **de.velopment**. In addition, Ms. Mayer does not demonstrate how any aesthetic impacts will directly impact her property. Accordingly, Ms. Mayer has not satisfied the Board Rule 14(A)(3) party status test with respect to Criterion 8.

c. Criterion 9(K)

Criterion 9(K), 10 V.S.A. § 6086(9)(K), requires the board or district commission to find that a development or subdivision will not unnecessarily or unreasonably endanger the public or quasi-public investment in various types of governmental and public utility facilities, services, and lands, or materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or enjoyment of or- access to the facility, service, or lands.

In her Petition, Ms. Mayer combines her discussion of Criterion 9(K) with that of Criterion 5. Therefore, her claim of party status, under Criterion 9(K) is based on impacts of the proposed development on Caper Hill and Spear Cemetery Roads. She states her conclusion that the proposed development may materially jeopardize the function of these roads, Petition at 2, but makes no showing of how the maximum of ten vehicle trips per day generated by the Project will materially jeopardize or interfere with the function, efficiency, or safety of, or the public's, use or enjoyment of or **access to** these roads. In addition, she does not demonstrate how any impact on these roads with respect to Criterion 9(K) will directly impact her property. Accordingly, Ms. Mayer has not satisfied the Board Rule 14(A)(3) party status test with respect to Criterion 9(K).

d. Criterion 10

Criterion 10, 10 V.S.A. § 6086(a)(10), requires the board or district commission to find that a subdivision or development is in conformance with any duly adopted local or regional plan or capital program under chapter 117 of Title 24.

In her Petition, Ms. Mayer states that the site of the proposed development is situated in the Rural Residential Area designated by the Reading Town Plan. Petition at 3. She states her conclusion that the proposed development does not conform to the Reading Town Plan, Id., but does not describe why the proposed development is a use which does not fit within the Rural Residential classification. In addition, she does not demonstrate how a failure of the proposed development to conform to the Reading Town Plan will directly impact her property. Accordingly, Ms. Mayer has not satisfied the Board Rule 14(A)(3) party status test with respect to Criterion 10.

2. Party status as a materially assisting party

Ms. Mayer also petitioned for party status as a materially assisting party. As recognized by Ms. Mayer, a person may be entitled to party status by permission if that person's participation will materially assist the board or commission by providing testimony, cross-examining witnesses, or offering argument or other evidence relevant to the ten criteria of 10 V.S.A. § 6086(a). Here, Ms. Mayer has not demonstrated how her participation will materially assist the Board.

In order to determine whether a person can materially assist the Board, the Board requires more than an assertion that such person can cross-examine witnesses and present experts. The Board also reviews whether that person possesses-particular expertise with respect to a proposed project, the complexity of the proposed project, whether the issues involved are novel and unfamiliar or ~~the~~ subject of sufficient public awareness, and whether the Board has. experience with the issues involved with the proposed project. Re: Pico Peak Ski Resort, supra.

Ms. Mayer states in the Mayer Memorandum that "she can be of materially [sic] assistance to the Board in this matter. No other parties than Applicant and Helen S. Mayer have appeared before the- Board in this appeal. Helen S. Mayer believes that by cross-examining witnesses and

presenting other witnesses, including experts, she can also be of material assistance on other criteria which the Board may deem implicated by this application. This may be of benefit to the Board owing to the fact that the 'minor' application issues may implicate criteria under which she **does** not claim any direct **impact.**" Mayer Memorandum at 10-11. Ms. Mayer also makes a similar statement in her Petition.

The proposed project is a 5,425 square foot student residence hall. This is not a complex, novel, or unfamiliar project which typically requires the Board to seek the assistance of persons with particular expertise. Ms. Mayer has not demonstrated otherwise. In any case, Ms. Mayer has made no showing that she can provide particular expertise with respect to this proposed project. Accordingly, Ms. Mayer has not demonstrated how her participation will materially assist the Board under Board Rule 14(B)(1)(b) regarding party status.

B. Board Rule 51

The Chair declines to rule on the second preliminary issue relative to Board Rule 51 due to the ruling on party status. If there is an objection to the Chair's ruling on party status, the Board will issue a ruling on the Board Rule 51 issue if necessary.

V. ORDER.

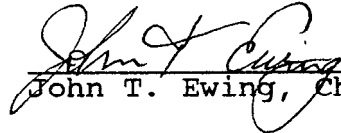
1. Ms. Mayer does not have party status to pursue this **appeal** under Board Rule 14(A)(3) or 14(B)(1)(b).

2. I therefore propose to dismiss this appeal. Pursuant to Board Rule 16(B), this Order shall become final unless a written objection to it, in whole or in part, is filed on or before **Monday, June- 19, 1995** in which case the matters, objected to shall be decided by the Board. If an objection is filed, the Board intends to deliberate on this matter on **Wednesday, June 28, 1995.**

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Dated at Montpelier, Vermont this 2nd day of June,
1995.

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John T. Ewing, Chair

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